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No. 10-1152

Supreme Court, U.S.
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In the Supreme Court of the United States

KAREN WAESCHLE, individually and on behalf of others similarly situated,

Petitioner,

v.

OAKLAND COUNTY MEDICAL EXAMINER AND OAKLAND COUNTY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Michigan

PETITIONER'S REPLY BRIEF

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WAESCHLE REPLY BRIEF

The request for *certiorari* asks this court to set a national rule on two issues:

1) There is a fundamental constitutional right to bury a loved one's remains which cannot be eliminated by a state legislature.

2) Federalism bars a state court from holding that certain property rights are ***not*** protected by the U.S. Constitution against taking without due process, where a federal circuit court has announced that such rights ***are*** federally protected.

Respondents' Brief in Opposition gives an excellent statement of national practice on these issues, and the need for this court to rule.

Respondents emphasize that the 'governmental interest' asserted is performance of a lawful autopsy. Respondents convincingly demonstrate that the question raised in this case is not esoteric or random, but concrete and a daily occurrence.

Every day the coroners and medical examiners in all 50 states perform autopsies which are authorized by state law, and which frequently are "in furtherance of a lawful criminal investigation." These government officials do not come into custody of the body randomly or arbitrarily. Their conduct is "state action" which is plainly "in furtherance of a legitimate government interest."

Thus, the extensive discussion by respondents about autopsies being "lawful" exercises of government

power confirms the prevalence of this matter, and also neatly frames the question presented here: when the autopsy is over, does the family have a fundamental right to dispose of the remains of their loved one?

The Sixth Circuit accurately stated:

> "The importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements. The recent explosion of research and information concerning biotechnology has created a market place in which human tissues are routinely sold to and by scientists, physicians and others. Note, *Toward the* [**13] *Right of Commerciality*, UCLA L. REV. 207, 219 (1986). The human body is a valuable resource. *See Moore v. Regents of the University of California, 51 Cal. 3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990)* (physician used patient's cells in potentially lucrative medical research without his permission). As biotechnology continues to develop, so will the capacity to cultivate the resources in a dead body. A future in which hearts, kidneys, and other valuable organs could be maintained for expanded periods outside a live body is far from inconceivable."

But, the question has never been addressed by the Supreme Court:

> "The [High] Court has not had occasion to address whether the rights of possession and control of one's own body, the most "sacred" and "carefully guarded" of all rights in the common law, Botsford, 141 U.S. at 251, are property

> interests protected by the Due Process Clause. Nor has it addressed what Due Process protections are applicable to the rights of next of kin to possess and control the bodies of their deceased relatives."

Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002)."

Clearly, citizens of the United States hold extreme reverence for the remains of our deceased. Rather than considering the bodies, ***and body parts***, of our military which are buried daily in Arlington National Cemetery as nothing more than "medical waste," every American would proudly announce that U.S. Marines do not risk their lives on the battlefield to collect mere "autopsy specimens." America spends millions of its tax dollars each year to recover the remains of our military to assure proper and full burial. "Remains" means each and every part, not simply the body whole. [The Joint Task Force Full Accounting spends $100 million per year to recover the remains of unaccounted Americans from WWII to present; Defense Department's Prisoner of War/Missing in Action Office spends $20 million just to obtain recoveries from Vietnam, Cambodia and Laos].

The issue before the court could not be more fundamental: do we have a right based in our Constitution to the remains of our loved ones, or may they be taken by the government?

It is a topsy-turvy legal system for the government to be foreclosed from taking your driver's license or some sand from a beachfront property without due

process, but then be permitted to "take" and destroy our loved one's dead bodies without notice or consequence.

Separately, respondents ask this court to deny review on the basis that the question will be presented again later, and is not presently ripe.

But the issue to be determined later by the District Court and then the Sixth Circuit is different than the matter now before the court.

The matter now before the court presently and concretely presents an appeal from a decision from the highest court of a state. The state court presumed the authority to determine, under state law, whether a right exists to the next of kin to bury their loved one, answering the question in the negative. This appeal and request for certiorari submits that question to be one not in the competence of the several states, but a matter governed by the Constitution and existing as a fundamental right of ordered liberty. Nothing remains to be "perfected" for that question to be answered directly by this petition.

Finally, respondents have no answer to the importance of certiorari for the perplexing question whether a state court has the power to change substantive state law in a manner which ***retroactively*** overrules the prior determination of a federal court. That prong of the request for certiorari extends beyond the subject matter of sepulcher and affects bedrock questions of federalism on every subject where the federal courts announce state law on a daily basis as this court explained in *Salve Regina Coll. v. Russell,* 499 U.S. 225, 239 (1991), "the very

essence of the Erie doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than a state judge."

Here, the federal court for the Sixth Circuit made a determination that under Michigan law, next of kin have a right of sepulcher. The present request for certiorari questions whether that right independently exists under federal constitutional law; of equal importance, it questions whether a state court can overrule the prior federal announcement of state law on a retroactive basis?

Certiorari should be granted.

Respectfully submitted,

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